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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 2 6 2007

LIN 07 015 53019

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an investment management company. It seeks to employ the beneficiary permanently in the United States as a portfolio manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a degree in the field of economics.

On appeal, counsel asserts that the evaluations sufficiently explain how the beneficiary's degree, supported by a transcript designating "no area of concentration," equates to a degree in economics. The petitioner submits new evaluations of the beneficiary's degree. For the reasons discussed below, the petitioner has not overcome the director's basis of denial.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign three-year bachelor's degree from the University of Western Ontario. As stated above, the transcript specifically states that the degree was awarded with "no area of concentration" designated.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. 244, 245 (Regl. Commr. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2).

While the beneficiary in this matter received a three-year degree, the record demonstrates that he entered college after receiving a Secondary School Honour Graduation Diploma, awarded after completing grade 13 rather than grade 12. All of the evaluations submitted are consistent that the Bachelor of Arts degree from the University of Western Ontario includes credits from the 13th year of secondary school (in the same manner that a U.S. university might give credit for advanced placement (AP) courses) and is, in and of itself, a foreign equivalent degree to a U.S. baccalaureate. The petitioner has also established that the beneficiary has the necessary five years of post-baccalaureate experience. Thus, we concur with the director that the beneficiary is an advanced degree professional.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") later stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS [former Immigration and Naturalization Service] under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)[(5)], 8 U.S.C. § 1182(a)[(5)]. The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu, 736 F. 2d at1309.

The key to determining the job qualifications is found on Form ETA 750A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA 750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education:	4+ years, Bachelor's Degree
Major Field of Study:	Economics
Experience:	5 years
Block 15:	Must be Chartered Financial Analyst (CFA)* * Will accept MBA in lieu of CFA Experience must include client relationship management, securities analysis and derivative trading. Extensive travel required.

When determining whether a beneficiary is eligible for a preference immigrant visa, Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In light of the above, it is clear that the job as certified by DOL requires a baccalaureate in the field of Economics. The beneficiary's transcript indicates that he received a "B.A. (3 yr.) No Area of Concentration." The petition was initially accompanied by an evaluation from [redacted] of the Trustforte Corporation. [redacted] asserts that the beneficiary "completed a major concentration in the field of Economics" based on the "nature of the courses and the credit hours involved." On October 27, 2006, the director issued a request for additional evidence noting that [redacted] provided insufficient detail as to how he concluded that a degree with "no area of concentration" amounted to a degree in economics.

In response, the petitioner submitted two additional evaluations from [redacted], an assistant professor at Hofstra University, and [redacted], a professor at Pace University. Dr. [redacted] states:

> Although the transcript . . . states "no area of concentration," it is evident that he completed a bachelor's-level major concentration in Economics. While the transcript issued to the candidate simply specified course numbers, an analysis of the course offerings of The University of Western Ontario confirms the course titles of the classes completed by the candidate. [The beneficiary's] coursework included classes

> and examinations in Economics, Intermediate Microeconomic Theory, Intermediate Macroeconomic Theory and Policy, Cost-Benefit Analysis, Accounting and Business Analysis, and Mathematics and Financial Analysis, as well as several courses in Statistics and Business Administration. In total, he completed twelve courses in Economics and related fields of Business Administration and Statistics. In doing so, he clearly surpassed the standard level of 32 credits in a major field of concentration required for a major at most US colleges and universities. Thus, it is abundantly clear that [the beneficiary] fulfilled a major in the field of Economics.

Subsequently, [redacted] asserts that, as a general rule, bachelor degrees in Economics granted by Canadian universities are considered to be equivalent to U.S. bachelor degrees in Economics.

[redacted] asserts that the beneficiary completed "advanced bachelor's-level studies in his area of specialization, Economics. The curriculum completed by [the beneficiary] is analogous to the curricula of bachelors' programs in Economics at colleges and universities in the United States." Finally, [redacted] further asserts that the coursework in Economics completed by the beneficiary "compares favorably with the level of complexity of courses in bachelors' programs in Economics at colleges and universities in the United States" and concludes that the beneficiary "fulfilled the requirements for a bachelor's-level major in the field of Economics." Neither [redacted] nor Dr. [redacted] explains why the transcript explicitly states that the beneficiary's education included no area of specialization if, in fact, the beneficiary completed enough Economics credits for a major in that field. Rather, they imply that notwithstanding that designation, the beneficiary's Economics credits are sufficient.

The director concluded that the transcript reflected that the beneficiary had completed only five courses in Economics, which the director computed to be 15 credits, whereas a U.S. baccalaureate in that field usually requires at least 30 credits in Economics exclusive of any other courses in math, finance or business. Thus, the director concluded that the beneficiary did not have the degree specified on the alien employment certification.

On appeal, counsel cites the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*) for the proposition that the director should have accepted the evaluations from "reliable credentials evaluation service[s]." Counsel also cites a September 12, 2006 memorandum entitled "*AFM* Update: Chapter 22: Employment-based Petitions (AD03-01)," HQPRD70/23.12 by Michael Aytes, Acting Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services (CIS). Page 53 of this memorandum provides:

> Credentials Evaluation: In cases involving foreign degrees, you may favorably consider a credentials evaluation performed by a certified independent credentials evaluator who has provided a credible, logical and well-documented case for such an equivalency determination that is based solely on the foreign degree(s). In addition, you may accept an evaluation performed by a school official that has the authority to make such determinations and is acting in his or her official capacity with the educational institution. Nevertheless, it is important to understand that any

educational equivalency evaluation performed by a credentials evaluator or school official is solely advisory in nature and that final determination continues to rest with the adjudicator.

Counsel does not challenge the director's conclusion that the beneficiary completed fewer total Economics credits than would be required for a U.S. baccalaureate in that field. Rather, counsel emphasizes that the beneficiary's degree is a three-year degree and that the *proportion* of Economics credits to other credits is higher than would be necessary during a four-year program. The petitioner submits new letters from [redacted] and [redacted] supporting counsel's analysis.

[redacted] acknowledges that "as a general rule, bachelors' programs at US universities require the completion of 32 courses to qualify for graduation," eight of which (25 percent) must be in a particular field to qualify for a concentration in that field. [redacted] then notes that the beneficiary completed 19 total courses at the University of Western Ontario, five of which were in the field of Economics. As the percentage of Economics courses was 26 percent, [redacted] concludes that the beneficiary "satisfies the requirements for a bachelor's-level major concentration in Economics." [redacted] then notes that the beneficiary completed courses in related fields and discusses the content of the beneficiary's Economics courses.

[redacted] provides a similar analysis, noting that the beneficiary completed a "majority" of his courses in Economics and that "his upper-level courses were focused primarily in the field of Economics." Finally, [redacted] notes the complexity of the beneficiary's Economics courses and concludes that "the international academic community would conclude that [the beneficiary] fulfilled a bachelor's-level major in the field of Economics." [redacted] explains how credentials evaluators determine a major for transcripts that "do not specify a particular major field of concentrations." The beneficiary's transcript, however, does not simply fail to list a field of concentration, but explicitly states that the beneficiary had "no area of concentration."

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Regardless, the memorandum cited by counsel acknowledges that evaluations are advisory only and must be credible, logical and well documented.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791, 95 (Commr. 1988). However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or

may give less weight to that evidence. *Id.* The issue is not the percentage of credits the beneficiary earned in Economics. We emphasize that the beneficiary's degree is considered equivalent to a U.S. baccalaureate because it incorporates credits from the beneficiary's 13th year of secondary school for a total of 120 credits. Thus, for the beneficiary to have a foreign equivalent degree to a U.S. bachelor's degree in Economics, the beneficiary must have earned the necessary credits in that field, not simply the same percentage of credits during a three-year period. While the evaluations assert that U.S. colleges and universities would consider the beneficiary's degree the equivalent of a U.S. bachelor's in economics, they do not address the fact that the University of Western Ontario clearly does not agree as it issued a transcript that explicitly states that the beneficiary's degree includes "no area of concentration."

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not submitted a letter from the University of Western Ontario withdrawing its statement on the transcript that the petitioner did not have an area of concentration or explaining how that statement is consistent with the evaluations submitted in support of the petition. Thus, the petitioner has not resolved the inconsistency in this matter. In light of the above, the petitioner has not overcome the director's finding that the beneficiary does meet the job requirements set forth on the alien employment certification; specifically, a bachelor's degree in Economics.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.